

November 26, 2007

**OFFICE OF THE HEARING EXAMINER  
KING COUNTY, WASHINGTON**

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**REPORT AND DECISION**

SUBJECT: Department of Development and Environmental Services File No. **E0500612**

**DARYL & CATHY EISENHAUER**  
Code Enforcement Appeal

Location: Parcel no. 102307-9130

Appellant: Daryl and Cathy Eisenhauer  
*represented by* **Paul Carkeek**  
P.O. Box 588  
Preston, Washington 98050  
Telephone: (425) 222-5662

King County: Department of Development and Environmental Services (DDES)  
*represented by* **Holly Sawin**  
900 Oakesdale Avenue Southwest  
Renton, Washington 98055-1219  
Telephone: (206) 296-6772  
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**SUMMARY OF RECOMMENDATIONS/DECISION:**

Department's Preliminary Recommendation:	Deny appeal with revised compliance schedule
Department's Final Recommendation:	Deny appeal with further revised compliance schedule
Examiner's Decision:	Deny appeal with further revised compliance schedule

**EXAMINER PROCEEDINGS:**

Prehearing Conference opened:	April 23, 2007
Prehearing Conference continued:	April 23, 2007
Prehearing Conference closed:	May 29, 2007
Hearing opened:	August 2, 2007
Hearing closed:	August 2, 2007

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes.  
A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. On February 7, 2007, the King County Department of Development and Environmental Services (DDES) issued a Code Enforcement Notice and Order to Appellants Daryl and Cathy Eisenhauer and the subject property, located on the banks of the Raging River. The Notice and Order found a violation of county code on the subject property: construction of a two-story structure located within critical areas (within the setbacks of the Raging River and an F-rated tributary stream), and within a Flood Hazard Area, without required permits, inspections and approvals, in violation of the building code and the Critical Areas Ordinance. The Notice and Order required correction of such violation by removal of the non-permitted structure from the property by May 14, 2007.
2. A Notice of Appeal and Statement of Appeal of the Notice and Order were filed by the Appellants with DDES on February 21 and 28, 2007, respectively, and were timely filed.
3. A prehearing conference on the above-referenced matter was held by the King County Hearing Examiner's Office on April 23, 2007. The above-named party representatives were present at the conference.
4. By Examiner order, the following appeal issues were accepted for consideration in this quasi-judicial appeal proceeding:
  - A. Is the structure within a Flood Hazard Area?
  - B. Is the structure two stories in height, or one-story, and is that issue legally relevant to the validity of the violation charged by the Notice and Order?
  - C. Was the structure built without required permits, inspections and approvals?
5. By the same Examiner order, the following appeal issues were concluded to be either lacking a cognizable allegation of error or are beyond the Examiner's jurisdiction to adjudicate, and were accordingly dismissed from consideration as challenges to the validity of the charge of violation:
  - A. The structure has no "impact" on the area's environment, is not a "nuisance," and does not pose a hazard. Such issues are irrelevant to the validity of the found violation. If it is the Appellants' intent to challenge the validity of the regulations at issue, that is a matter outside of the Examiner's jurisdiction. First, the Examiner has no legislative authority; desired revisions to established law must be addressed to the County Council, the state legislature and/or the United States Congress as appropriate, for legislative remedies. If the claim is one of equity, the issue is not under the jurisdiction of the Examiner to adjudicate and would instead have to be taken to a court of general jurisdiction, the Superior Court. The Examiner is generally limited to applying "black letter" law as duly enacted by statute and ordinance, and has no authority to adjudicate common law issues such as claims in equity. [*Chaussee v. Snohomish County*, 38 Wn. App. 630; 689 P.2d 1084 (1984)] Lastly, if the claim is of unconstitutionality of the regulation at issue, the Examiner is without authority to decide a facial claim of unconstitutionality. [*Exendine v. City of Sammamish*, 127 Wn. App. 574; 113 P.3d 494(2005)] That claim would also have to be taken to Superior Court.

- B. The required removal of the structure constitutes an unconstitutional taking of private property without due compensation. The Examiner similarly does not have authority to rule on such a claim of unconstitutional taking. [*Exendine*, above]
6. The Appellants claim that prior to their constructing the subject structure, county staff informed them upon their inquiry that a structure under 200 square feet of floor area does not require a permit, and that they relied on such information as a grant of approval of the structure. The Appellants argue that such County “approval” should be reliable and should constitute a represented permit waiver, and that if there were critical areas issues which pertain to the development regardless of the building permit requirement, there was no permit review to trigger their information of those critical area requirements.
7. The Appellants also argue that there are ten other structures on properties of similar size and topography in the immediate area, which are fully developed residences and therefore of much greater development intensity than their small building which is utilized only for recreational purposes (storage of aquatic recreation-related equipment).
8. The Appellants also argue that the requirement of the county that if they desire to retain the structure onsite that a reasonable use exception (RUE) permit be sought, with its expenses and permit fees, constitutes a hardship on the Appellants and that the county should waive any fees for such permit. The Appellants also argue that an alternative to an RUE permit is approval of a Rural Stewardship Plan from the county, that the County has indicated that it would not approve a Rural Stewardship Plan for the site, and that it is unfair for the county to deny approval of such a plan.
9. The county has asserted in this proceeding that a component of the flood hazard area regulations violation which should be taken into account is that it appears that the property lies within the Raging River Floodway. The county has essentially stipulated, however, that it is not certain that the structure lies within the actual defined regulated floodway, and the evidence record is not sufficiently substantiated to show conclusively that it is.
10. The Appellants argue that no flooding has been observed in the Raging River area in question during regional flooding events, thereby implying that the floodway and flood hazard area designations must be erroneous. Such arguments are misplaced: first, flooding during regional storm events can be highly localized, and the fact that flooding did not occur on the Raging River during a regional flooding event does not in and of itself mean that the floodway designation on the subject property is in error. Second, and most importantly, it is irrelevant to the Examiner’s consideration of any flood hazard area regulation of the property and its development. If the floodway designation and/or any other flood hazard area regulation applicable to the property are in error, the remedies are legislative and/or rulemaking in nature, with resort to county legislative review and/or a request to the Emergency Management Agency (FEMA) for review of the accuracy of the floodway/flood hazard area designations.
11. The preponderance of the evidence in the record demonstrates that the subject 192 square foot, two-story structure cited in the Notice and Order lies within the regulatory structural setbacks from the Raging River and tributary stream areas, that it was constructed without necessary approvals for construction in such areas, and that the structure is in violation of the code thereby. The charge of violation in the Notice and Order is therefore correct. DDES is also correct in its assertion that if the structure is to remain in place, a Critical Areas Reasonable Use Exception (RUE) permit must be obtained (or the seeming alternative Rural Stewardship Plan approval, which the County has indicated is not able to be granted). As noted, the Appellants stipulated during the hearing to the requirement of such a permit.

## CONCLUSIONS:

1. The Appellants' arguments about reliance on a verbal "approval" stated by the county regarding the subject structure, when the county informed the Appellants that no building permit was needed due to its flood area, and that any permits and permit and review fees should be waived due to the Appellants' reliance, constitute claims of *equitable estoppel*, i.e., that the County should be *estopped* from enforcing such black letter law regulation due to the inequities caused by the County's role in establishing their asserted reliance on County representations. As noted previously, the Examiner cannot address the Appellant's complaints from a common law equity standpoint. [*Chaussee*, above]
2. The Notice and Order is correct in its finding of a violation of critical area development restrictions and requirements and shall be sustained.
3. If they desire to retain the structure onsite, the Appellants have a reasonable need to research the viability of making a reasonable use exception permit application and any follow-on permit applications, if any are required, and to assess the relative costs of such permits, related reviews and resultant construction requirements (versus demolition), and the Examiner shall include time for such deliberations in the compliance time schedule. Of additional consideration in such regard is that if the demolition option is chosen by the Appellant, the allowance of a reasonable portion of the normal full year period for demolition under a demolition permit is preferable in the instant case rather than the relatively short timeframe recommended by DDES, given the advent of the rainy season and resultant potentially problematic erosion and debris spread possibilities aggravated by wet weather. A longer timeframe, through part of the next dry season, will allow the demolition to occur in a more orderly fashion with less potential for environmental damage such as erosion, sedimentation, etc.

## DECISION:

The appeal is DENIED and the Notice and Order sustained, except that the compliance requirements shall be as stated in the following order.

## ORDER:

1. The subject structure shall be removed from the property *by no later than **June 30, 2008***, with obtainment of a demolition permit as may be required by DDES and removal of the demolition debris from the site and disposal at an approved facility.
2. As an alternative to demolition/removal, the Appellants/property owners and/or their representative(s) shall schedule and attend a pre-application conference with DDES *by no later than **January 31, 2008***, and shall submit a complete application for the necessary permits (e.g., a reasonable use exception (RUE) permit) to retain the structure onsite *by no later than **March 31, 2008***. Any and all deadlines for agency-requested further information for processing of the permit shall be met.
3. If at any time, the Appellants/property owners fail to follow-up with scheduling a pre-application meeting or the filing of a complete building permit application, or fail to meet a deadline for agency-requested further information, or fail to obtain an approved permit within required deadlines, the structure shall be removed from the site under the above requirements for demolition *by no later than **90 days from the date of the first missed deadline***. However, DDES in its sole discretion may extend any such deadlines for good cause based on circumstances beyond the Appellants' control.

4. If at any time a necessary permit is denied in final form, the structure shall be removed from the site under the above requirements for demolition *by no later than 90 days from the date of the first missed deadline*.
5. No penalties shall be assessed by DDES against the Eisenhauers and/or the property if the above deadlines are complied with. If any one of them is not, DDES may assess penalties against the Eisenhauers and/or the property retroactive to the date of this order as provided by county code.

ORDERED November 26, 2007.

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Peter T. Donahue  
King County Hearing Examiner

TRANSMITTED November 26, 2007 via certified mail to the following:

Paul Carkeek	Daryl & Cathy Eisenhauer
Eco-Site	1717 SW Hook Rd.
P.O. Box 588	Lee's Summit, MO 64082
Preston, WA 98050	

TRANSMITTED November 26, 2007, to the following parties and interested persons of record:

Marshall Brenden 18225 SE 128th Renton WA 98059	Paul Carkeek Eco-Site PO Box 588 Preston WA 98050	Daryl & Cathy Eisenhauer 1717 SW Hook Rd. Lee's Summit MO 64082
Deidre Andrus DDES/LUSD MS OAK-DE-0100	Elizabeth Deraitus DDES/LUSD MS OAK-DE-0100	Jo Horvath DDES/BSO MS OAK-DE-0100
Lamar Reed DDES/LUSD MS-OAK-DE-0100	Holly Sawin DDES/LUSD MS OAK-DE-0100	Toya Williams DDES/LUSD MS OAK-DE-0100

### NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding Code Enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE AUGUST 2, 2007, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT  
AND ENVIRONMENTAL SERVICES FILE NO. E0500612.

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Holly Sawin and Don Gauthier representing the Department; Paul Carkeek representing the Appellant, and Cathy Eisenhauer and Marshall Brenden.

The following Exhibits were offered and entered into the record:

- |                |   |
|----------------|---|
| Exhibit No. 1  | Party of record list  |
| Exhibit No. 2  | DDES staff report to the Hearing Examiner for August 2, 2007                    |
| Exhibit No. 3  | Copy of the Notice & Order issued February 7, 2007                              |
| Exhibit No. 4a | Copy of the Notice received February 21, 2007                                   |
| Exhibit No. 4b | Copy of the Statement of Appeal received February 28, 2007                      |
| Exhibit No. 5  | Copies of codes cited in the Notice & Order                                     |
| Exhibit No. 6a | Color photograph of subject structure taken by Holly Sawin on December 20, 2006 |
| Exhibit No. 6b | 2005 Aerial with annotation indicating the subject structure                    |
| Exhibit No. 7  | Letter to Paul P. Carkeek from Joe Miles dated December 27, 2005                |
| Exhibit No. 8  | Map of the Raging River showing flood hazard areas                              |
| Exhibit No. 9  | 2005 plot map showing subject parcel  |
| Exhibit No. 10 | Letter to Paul P. Carkeek from Joe Miles dated March 10, 2006                   |
| Exhibit No. 11 | Annotated aerial photo (2 pages)  |
| Exhibit No. 12 | Memo with 11 attachments from the Appellant                                     |
| Exhibit No. 13 | King County citations regarding flood hazard areas                              |

PTD:gao  
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